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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 527

THE UNITED STATES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

No. 528

THE CITY OF LOS ANGELES, *Petitioner*

v.

CITIZENS UTILITIES COMPANY, ET AL

On Petitions for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims is reported in 149 F. Supp. 158 (Ct. Cls. 1957).

QUESTION PRESENTED

Whether California-Pacific Utilities Company, the holder of a contract executed pursuant to the Boulder Canyon Project Act to purchase electrical energy from the United States, was entitled to a right of renewal pursuant to Section 5(b) of the Act which expressly granted such right to "the holder of any contract for electrical energy."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. 617, *et seq.*[1] The regulations involved are the General Regulations for Lease of Power, issued April 25, 1930 and amended March 10, July 1, and November 16, 1931; and General Regulations for Generation and Sale of Power in accordance with the Boulder Canyon Project Adjustment Act promulgated May 20, 1941.[2]

STATEMENT

On December 28, 1937, the predecessor of California Pacific Utilities Company (hereinafter "Cal-Pac") entered into a contract with the United States (acting through the Secretary of the Interior) for the purchase from the United States of a small amount of electrical energy generated at Boulder Canyon Dam.[3] The contract provided for annual purchases of energy until December 31, 1954 and was executed "particularly pursuant to . . . the Boulder Canyon Project Act."[4] This Act governed the operation of Boulder Canyon Dam and contained the Secretary's authority to sell energy on the terms and conditions stated

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[1] B. 13 *et seq.* References "B. —" are to a bound volume entitled "Boulder Canyon Project Final Reports Part I—Introductory, Bulletin II, Hoover Dam Power and Water Contracts and related data, the United States Department of Interior, Bureau of Reclamation." It contains copies of the statutes, regulations, contracts, opinions and related data referred to in the brief hereafter. This volume was introduced in the case below as Government's Exhibit 1. Relevant portions of the Project Act are set forth in Appendix B.

[2] B. 1113 *et seq.*; B. 1129 *et seq.* Relevant portions of the Regulations are set forth in Appendix A.

[3] The contract is set forth at B. 639 *et seq.* It was amended in 1941 in respects not material here. B. 985 *et seq.*

[4] B. 639-640; B. 985-986.

therein. In order to distribute the energy purchased, the contractor constructed transmission lines from Boulder Canyon to Needles, California and Nelson and Searchlight, Nevada, and thereafter supplied these communities with the energy it purchased at the Dam.

Before December 31, 1954, Cal-Pac requested renewal of its contract for energy pursuant to the terms of Section 5(b) of the Project Act which provided:

> "(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply."

But the Secretary refused to renew the contract or to compensate Cal-Pac for his failure to renew.[5] Cal-Pac then brought the action below for damages. Its petition was consolidated with that of Citizens Utilities Company (hereinafter "Citizens"), another contractor similarly situated. Cal-Pac and Citizens alleged that Section 5(b) of the Project Act entitled them to a renewal of their contracts. The Court of Claims unanimously agreed and granted summary judgment for Cal-Pac and Citizens, directing that the amount of the judgment be determined in further proceedings under Rule 38(e) of that Court.[6] The Government and the City of Los Angeles (hereinafter "City") thereupon petitioned this Court for a writ of certiorari.

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[5] The exchange of correspondence is set forth in Exhibits A through E attached to Cal-Pac's petition in the Court of Claims. (R. 39-47).

[6] 149 F. Supp. 158, 163.

REASONS FOR DENYING THE WRIT

1. The Issue in This Case Is Far Too Narrow to Warrant Certiorari

This controversy concerns the meaning of a special statute governing the operation of a single hydroelectric project. The sole issue determined by the Court of Claims was that, under the circumstances of this case, Cal-Pac and Citizens were the "holders of contracts for electrical energy" within the mandatory renewal provision of the statute and that they were therefore entitled to a renewal of their contracts. The issue presents no conflicts with rulings of other courts. It raises no questions of general applicability to other statutes or other cases. Indeed, the petitioners have not even suggested that the controversy affects anything other than energy contracts at Boulder Dam. There are currently nine contractors for energy. At the outset, then, it is clear that these petitions raise an extremely narrow issue whose broadest conceivable effect is confined to the renewal of contracts to purchase energy generated at a single dam. On this basis alone, respondent submits that there is no special significance in this case warranting the attention of this Court.

2. The Opinion Below Is Limited by the Unique Facts of This Case to a Situation Which, as a Practical Matter, Will Never Arise Again

The issue raised by this case is even more confined than is suggested above, for the Court's holding below is further restricted in its impact by the singular facts upon which it is based. Its total impact is limited solely to the contracts held by the two respondents to purchase less than 1.7 per cent of the energy produced at a single dam.[7]

[7] Of the total firm energy generated, 4,240,000,000 Kilowatt-hours (Regulations, Art. VII, B. 1121), Cal-Pac was entitled to a maximum of 20,000,000 Kilowatt-hours (B. 642), and Citizens Utilities Company to a maximum of 50,000,000 Kilowatt-hours (B. 660).

The energy purchased by Cal-Pac from the United States has been characterized as energy "unused" by the Metropolitan Water District (hereinafter the "District"). This appellation was the result of the Secretary's initial allocation plan[8] for distribution of the energy to be produced on completion of Boulder Dam. In 1930, the Secretary promulgated Regulations which, as amended, allocated 36 per cent of this energy to the District and which contemplated that the District would guarantee payment for the full 36 per cent. But while the District could call for up to 36 per cent of the energy, it was entitled to purchase only so much of its allocation as it would use for pumping water into its aqueduct. The Regulations expressly contemplated that the District might not be able to use the full 36 per cent for pumping by the time deliveries were to begin and, consequently, further provided that the Secretary "dispose of such unused energy until required by the District for said purpose."[9]

The whole burden of the petitioners' case is directed to the contention that a contract to purchase the so-called "unused" energy is somehow different from other contracts under the Project Act with respect to the renewal provisions of the Act. Without regard to the merits of this contention, it is now quite clear that any such distinction is, for all practical purposes, entirely moot except for this case. As of the current date, the entire energy output of Boulder Dam has been purchased until 1987.[10] These

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[8] Article V, Regulations, R. 1113, 1115-1120. The relevant portion of Article V, as amended, appears in Appendix A hereto.

[9] See *Id.* at p. 4a. (Section entitled "Of Firm Energy Allocated to but not Used by the District")

[10] In 1945, the Secretary executed a contract which petitioners contend sold all unused energy. (City Petition, 7; Gov't Petition, 15). Cal-Pac urged below that this contract did not sell the energy belonging to it and Citizens. The Court of Claims expressly noted the ambiguity of the contract with respect to this small amount, but deemed the 1945 contract irrelevant to the issue in the case. 149 F. Supp. 158, 161-162.

purchases include absolutely all of the energy allocated to the District, but "unused" by the District for pumping. In fact, in the Court of Claims, the petitioners expressly contended that all "unused" energy had been sold to the third parties below.[11] At the same time, the District has made clear the fact that there will be no "unused" energy available for sale by the Secretary after 1987.[12] In short, there is simply no real likelihood of a recurrence of future contracts for sale of "unused" energy. And, of course, if there is no "unused" energy available, there is nothing to which renewal rights to such energy may attach. Therefore, the problem raised by these petitions is meaningless apart from this case.

We reach the same conclusion even if we were to ignore these facts and assume that "unused" energy may somehow be available for sale by the Secretary at a future date. Actually, the Court of Claims opinion, by directing its ruling to the particular circumstances under which Cal-Pac's contract arose, makes it perfectly clear that the Secretary is in a position to prevent the recurrence of any issue posed in this case. These circumstances are as follows.

In 1937 when the Dam neared completion and the time approached for beginning delivery of energy to the District, the Secretary and the District were then able to determine how much energy the District could not use for pumping and which would therefore be available for disposition by the Secretary to others. Accordingly, in August of 1937, the District advised the Secretary that there would be "definitely available for disposition by the Secretary without possibility of utilization by the District," unused energy until the end of 1954, and requested the Secretary to

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[11] *Ibid.*

[12] Indeed petitioner City claims that none will be available after May 31, 1959! (City Petition, 7 n. 4) Cal-Pac has no primary knowledge of this latter fact.

dispose of such "unused" energy until required by the District.[13] The Secretary then offered this energy to certain other parties to whom the allocation plan gave the first opportunity to purchase the "unused" energy and all of these parties declined the offer.[14] During this time Cal-Pac's predecessor made application for a portion of the District "unused" energy "until such time as they [the District] may require the power for their own use which we understand would not be for a period of approximately 17 years . . . ."[15] The Secretary then submitted to Cal-Pac's predecessor a contract providing for delivery of energy beginning at a prescribed date and extending to "and including December 31, 1954, from which latter date it is estimated that Metropolitan Water District will require for its own purposes all energy contracted for by it."[16]

It was these facts which led the Court of Claims to note that it was dealing with a contract which contained no explicit renewal provision and with a situation in which there had been absolutely no focus upon renewal.[17] At the time of the contract the parties simply had no indication that the subject matter of the contract, *i.e.*, "unused" energy, might be available after the contract term. Certainly the recurrence of this situation would be unlikely in any circumstances. And now, with the Court of Claims ruling before him, it is entirely within the Secretary's power to prevent such a recurrence simply by dealing with any question of renewal in executing any future contracts for "unused" energy. Indeed, the Court of Claims opinion implies that under appropriate circumstances the Secretary and a contractor may agree that there will be no

[13] Exhibit 11 to Gov't Brief below (R. 174).

[14] Exhibits 13-18, 20 to Gov't Brief below (R. 178-194, 197).

[15] Par. 8, Gov't Answer below (R. 51).

[16] Par. 3, Exhibit 19 to Gov't Brief below (R. 196).

[17] 149 F. Supp. 158, 161.

renewal of a contract.[18] Thus, the petitioners are now asking this Court to review an interpretation of the application of the Project Act not only to a type of contract shortly to become extinct, but also to circumstances which the Secretary may hereafter avoid.

3. The Opinion Below Does Not Affect the Future Administration of Boulder Canyon Project

The petitioners urge that the Court of Claims opinion results in "confusing" the future administration of the Project. In the Government's view, the Secretary can no longer "safely make any short term interim arrangements for disposition of surplus energy . . . ."[19] The City apparently goes one step further and contends that even "the allottees" (contractors purchasing energy from the Secretary) are also now prevented from making any temporary contracts for resale of energy.[20] Both contentions are incorrect.

Insofar as the City's contention is concerned, the opinion below bears absolutely no relation to sales of energy by anyone other than the Secretary. The Court of Claims held only that the Secretary, acting on behalf of the United States and exercising his statutory authority to make contracts, was required by the Project Act to renew *his* contract with Cal-Pac under the circumstances of this case. Clearly, the City or any other "allottee" may sell its energy for whatever term it pleases, and the administrative injury envisioned by this petitioner is non-existent.

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[18] *Ibid.* The Court noted that no issue of "waiver" had been seriously urged and that if it had been, the circumstances "might well rebut" any inference of waiver of the statutory right to renewal. We infer that the Court believes that contractors can waive this right and agree not to take a renewal.

[19] Gov't Petition, 16-17.

[20] City Petition, 18-19.

The Government's purported claim of "confusion" is also without merit. The Government expresses concern for short term dispositions of "unused" energy when there is no real likelihood that such energy will be available for future sale. It worries over a situation which the Secretary may readily avoid, for the opinion below certainly implies that, under appropriate circumstances, the Secretary can expressly agree with a contractor to enter into a non-renewable short term contract. And it expresses its concern where there is even no practical administrative reason why such short term dispositions would be sought in circumstances within the holding of this case. Certainly it is only in the most remote and speculative situation, if at all, that the Secretary would object to selling energy for the full period of its availability, to a contractor willing to build facilities to distribute the energy to consumers in the area of the dam. And we have the Government's own administrative determination to this effect in the words of the Solicitor of the Department of the Interior[21] when the Secretary felt "compelled" to deny Cal-Pac a renewal:

> "It is frankly conceded that fairness and the economics of the entire situation strongly impel one to a renewal of these contracts. It is with the utmost of reluctance that I have arrived at the opinion herein expressed. It is also to be regretted that the primary allottees do not see their way clear to permit the sale of this energy to these small communities, which lie much closer to the Boulder Canyon development than do the allottees, but as a matter of the legal interpretation of the contracts, I feel driven to the conclusion herein expressed."

4. The Damages Are Irrelevant and Virtually Insignificant Since the Government Can Readily Mitigate Them

The Government urges the substantial damages incurred by respondents in this case as a reason for granting the

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[21] Exhibit B to Cal-Pac's Petition in the Court of Claims (R. 42, 44).

writ.[22] Of course, the damages are the Government's own doing and, we submit, the amount is totally irrelevant. Nor has the amount of damages ever been determined. In any event, the Government can mitigate, to the point of relative insignificance, whatever damages it caused simply by renewing respondents' contracts as requested or by selling respondents low cost energy from other sources. Cal-Pac has always been willing to accept a renewal or to accept other energy to prevent damages.

5. The Court of Claims Decision Is Correct

In 1928, Congress enacted the Boulder Canyon Project Act to enable construction and operation of a Dam and related facilities at Boulder Canyon. The Act enabled creation of a primary source of hydroelectric energy for the Pacific Southwest and it looked to public and private utilities to invest in facilities necessary to distribute energy generated at the Dam to consumers in the area. At the same time, the Act contemplated that the sales of energy to the utilities would furnish revenue which would be used to defray the costs of construction and operation of the Project. Section 5 of the Project Act established an integrated scheme of contract provisions designed to accomplish both of these objectives by conferring authority upon the Secretary to sell energy pursuant to contracts governed by the requirements stated in the Section.[23]

Generally, these requirements were as follows: no contract was to exceed 50 years; charges for energy were to be set with a view to repaying the Government's investment in the project, and contracts were to be executed with financially responsible applicants; in the case of conflicting applications states were to be given first preference and other preferences were to follow in accord with the public interest and the policy of the Federal Water Power Act;

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[22] Gov't Petition, 18.

[23] Section 5 is set forth in Appendix B.

and larger contractors were required to share transmission facilities. In addition, the Section also required that "the holder of any contract for electrical energy . . . shall be entitled to a renewal" unless its facilities were acquired and the contractor appropriately compensated.

The indebtedness of the statutory contract scheme to the Federal Water Power Act was made clear, not only by the preference requirements, but also by the renewal provision. This provision was taken almost verbatim from the Power Act,[24] and contemporary legislative materials indicate that the renewal section was written with the Power Act in mind.[25] The Power Act had provided for the licensing of public and private parties to build and maintain facilities for the purpose, *inter alia*, of distributing energy to communities in the region. The Act required that, upon expiration of any license, the licensee was absolutely entitled to a renewal except where his facilities were acquired and he was appropriately compensated.[26] The renewal scheme thus accomplished two primary objectives: it provided an inducement to the licensee to invest in and operate facilities by granting a right to renewal or compensation; and the Government retained the right to acquire the licensee's facilities, thus insuring a continuity of adequate service to communities serviced by the licensee.

In the court below, Cal-Pac emphasized the fact that the language of the Project Act entitled the holder of *any*

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[24] See 16 USC §§ 807, 808 set forth in Appendix C.

[25] Senator Johnson of California stated on the Senate floor that: "Sub-division (b) of Section 5 is really part of the Federal Water Power Act." 66 *Cong. Rec.* p. 7251. And a Report of the Senate Committee on Irrigation and Reclamation stated: "Provision is made for renewals along the lines provided in the Federal Water Power Act for renewals of licenses." *Sen. Rpt.* #654, Part I, p. 27, 69th Cong., 1st Sess.

[26] See Appendix C.

contract for energy to a renewal and that the Act specifically required that the Secretary's contracts "shall be governed" by this renewal provision. Cal-Pac also urged that if any limitation were to be imposed on this language, it should certainly be done with a view to the express origins of the provision in the Power Act. The Court of Claims apparently agreed. It found that Cal-Pac unquestionably held a contract for electrical energy pursuant to the Project Act and that "the equity of the statute" providing for renewal was fulfilled by the facts in this case.[27] The Court expressly found that, as a matter of fact, the renewal privilege for Cal-Pac would protect Cal-Pac's investment in facilities to distribute Boulder Dam energy and would protect its customers who had become dependent upon the continued flow of that electricity.[28]

In this connection, the Court below was apprised of the full effect of the failure to renew upon the citizens of the small communities of Needles, Nelson and Searchlight. As a result of its inability to obtain a renewal, Cal-Pac was forced to buy energy at almost four times the cost and to obtain from the California Public Utilities Commission an approximate 25 per cent increase of its retail rates in California—with a proviso for reimbursements to its customers in the event it later obtained a renewal of its energy contract.[29] The Boulder Dam energy properly deliverable to Cal-Pac was handed over to City, Southern California Edison Co., Ltd. (hereinafter "Edison"), and California Electric Power Co. (hereinafter "California Electric"), where its beneficial effect was so infinitesimal that it cannot even be reflected in rates to their consumers.

Despite all of the foregoing, petitioners now contend, as they contended below, that the language of the renewal

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[27] 149 F. Supp. 158, 162.

[28] *Ibid.*

[29] Public Utilities Commission of the State of California, Decision No. 51750, July 26, 1955.

provision in referring to "any" contract really meant only "some" contracts should be renewed: that not only the renewal provision, but all of the integrated contract provisions of Section 5 really applied only to a select group of "some" contractors; and that, despite its recitation to this effect, Cal-Pac's contract was not executed "particularly pursuant" to the Secretary's contracting authority in Section 5 of the Act and Cal-Pac did not therefore fall within this "select group." The whole burden of petitioners' argument is directed to a claim of error because the court below failed to distinguish Cal-Pac from their group of elite contractors to whom Section 5 purportedly applies. Examining petitioners' contentions in the context of the sequence of events since the passage of the Act is perhaps the best evidence that petitioners rely upon interpretations inconsistent with each other; inconsistent with prior administrative practice, and totally at war with the language and intent of the Project Act.

Section 4(b) of the Project Act required that, before any appropriations were made or any construction began, the Secretary should obtain contracts which were sufficient in his judgment to bring the United States enough revenue in 50 years to repay the costs of the Project.[30] On April 26, 1930, the Secretary contracted with the City and Edison to make these parties lessees of parts of the proposed dam and generating equipment and obligating them to generate the energy for themselves and others.[31] The contract also provided for the sale of 22 per cent of the dam's energy to them, and the contractors guaranteed to purchase an additional 42 per cent of the energy if such energy was not purchased by others. The Secretary then reported that this contract was sufficient by itself to provide revenues to pay for the project.[32]

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[30] See Appendix B, p. 6a.

[31] B. 291 *et seq.*

[32] Opinion of Attorney General, June 9, 1930 reported at B. 1245, 1252; Opinion of Comptroller General, October 10, 1930, reported at B. 1255.

Petitioners argue that the Court of Claims erred in failing to recognize that the integrated contract provisions of Section 5 apply only to the contracts required by Section 4(b) and thus do not apply to Cal-Pac.[33] In reply, it need only be noted that: Section 4(b) merely required a finding of fact by the Secretary that, before appropriations and construction, he had entered into contracts providing revenues sufficient to meet the costs of construction and maintenance of the Dam; that the Project Act contains absolutely no language limiting the Secretary's authority to enter into only those contracts necessary for his finding; that the "select group" thus nominated by petitioners as being subject to the Act's contract scheme require the conclusion that Congress legislated an entire statutory scheme to govern one contract and all others are excluded; and that, judged by this criterion, petitioners' "select group" is wholly inconsistent with its designation elsewhere of other contractors who fall within the group.[34]

After executing the City-Edison contract, the Secretary proceeded, on the same date, to enter into a contract with the District which, as amended, provided that the District would guarantee payment for .36 per cent of the energy at the Dam, but would purchase only so much of this energy as it could use for pumping water, with the remaining "unused" energy to be disposed of by the Secretary. Both the City-Edison contract and the District contract incorporated, and were executed pursuant to, a scheme of distribution of energy contained in the Regulations pro-

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[33] City Petition, 12-13.

[34] The Government claims that the Act applies to three "primary contractors"—the parties to whom 100 per cent of the energy was purportedly sold in 1930. Gov't Petition, 2-3, 9. City makes conflicting contentions that the Act applies: (a) To the one Section 4(b) contract (City Petition, 13); (b) To contracts of nine "allottees", (*Id.* at 13); or (c) To 6 contracts with firm commitments for 50 years, (*Id.* at 12).

mulgated by the Secretary earlier in 1930.[35] These Regulations, as incorporated in the District contract, contemplated that the energy generated at the Dam would be purchased in the following way:

1) City and Edison to purchase 22 per cent and to guarantee payment for an additional 42 per cent to the extent it was not sold to states and municipalities. (Edison's 9 per cent allotment was also shared with two other private companies.)

2) Arizona and Nevada to purchase up to 18 per cent each.

3) Some of a group of twelve municipal applicants to purchase up to 6 per cent.

4) The District to purchase up to 36 per cent for use in pumping and to guarantee payment for the full 36 per cent to the extent unused energy was not sold to and paid for by others.

5) Undesignated purchasers to purchase unused District energy to be sold by the Secretary.

During the subsequent fifteen years, the Secretary proceeded to execute contracts pursuant to his distribution scheme.

In 1931, he executed contracts with three of the municipalities[36] and with two private companies to whose rights others later succeeded.[37] In 1936, Nevada contracted to purchase part of its 18 per cent allotment.[38] In 1937, Cal-Pac and the other respondent, Citizens, contracted

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[35] B. 291, 323, 343, 351. The allocation portion of the Regulation is set forth in Appendix A.

[36] B. 405, 443, 461.

[37] B. 423, 479. (California Electric succeeded Southern Sierras and City succeeded Los Angeles Gas and Electric).

[38] B. 565, 581.

for their energy.[39] During World War II, the remaining "unused" District energy was sold principally to Defense Plant Corporation under the War Powers Act rather than Section 5 of the Project Act.[40] And, when this contract expired in 1945, the remaining "unused" energy was sold to City, Edison and California Electric.[41] Finally, in 1945, Arizona contracted for part of its allotment.[42]

Petitioners now suggest that the Secretary's contracts with City-Edison and the District were "primary contracts" covering sale of 100 per cent of the Dam's energy, and since these contracts alone assured full sale of the energy, they are the only contracts covered by the Act.[43] Petitioner City adds that Cal-Pac could not be included because it was purportedly not a party in the allocation plan allotting 100 per cent of the energy.[44]

Of course, the short answer to these contentions is the perfect clarity with which the distribution scheme establishes that the Secretary neither intended to nor did in fact sell 100 per cent of the energy to the petitioners' "select group" of three. This group did guarantee payment for 100 per cent of the energy, but only to the extent that it was not taken and paid for pursuant to other contracts expressly contemplated by the Regulations. Indeed, the Regulations conclusively demonstrate that, from the inception of the administration of the Project Act, the Secretary interpreted the Act to apply to other contracts he would execute at a later date, including contracts for sale of

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[39] B. 629, 657.

[40] See Art. 4, B. 934; B. 951, 961, 973. Unused energy was also sold for very brief periods to others under contracts which expired and to contractors who apparently did not desire to renew. B. 681, 703, 723.

[41] B. 1061.

[42] B. 1101.

[43] See n. 34, *supra*.

[44] City Petition, 12.

"unused" energy. And there was no reason then, nor is there any now, why all of these contemplated contracts are not within the explicit contractual scheme set up by the Act.

Certainly, the Project Act says nothing about "primary contractors", or "prime contracts", or "primary purchasers". These are all inventions of petitioners. Nor is there any reason for the application of the Act's contract provisions to such a select group. The States and municipalities received their preferences pursuant to the Act, but the petitioners would not include them in its coverage. None of the contracts executed by the Secretary could or did exceed the 50 year limitation, but the petitioners would read the limitation to be inapplicable to all but three contracts. Every contract, including Cal-Pac's, executed pursuant to the Regulations: recited that it was executed "particularly pursuant" to the Act; obligated the United States to deliver Boulder Dam energy; and obligated the contractor to pay the United States. Yet, these petitioners urge error because the Court did not interpret the Act's simple references to "contracts for energy" to cover only an elite group of three contractors.

The Court of Claims, after examining the same allegations made by petitioners, concluded that the only conceivable distinction between Cal-Pac's contract and that of other contractors rested on the fact that Cal-Pac purchased energy which the Secretary sold because the District could not use it.[45] It reached this conclusion after examining the variety of contracts entered into by purchasers and the range of variation displayed. The Court's conclusion was really one of fact, for each of the contracts executed obviously pursuant to the Act contained different provisions geared to the objectives sought by the Secretary in each case. Thus, some of the contracts were for

[45] 149 F. Supp. 158, 161.

50 year terms, others were not.[46] Some contained firm commitments to purchase energy, others did not.[47] Some were for "firm" energy alone, others contained additional rights to "secondary" energy, some concerned "unused" energy.[48] But all were clearly executed pursuant to the Secretary's authority in Section 5 and subject to the requirements stated therein.

The Court then properly concluded that a contract for "unused" energy was certainly not to be differentiated with respect to renewal or any other provision of the Act.[49] It was a contract for energy. The energy was sold by the United States. The Secretary, in retaining the right to sell "unused" energy was acting on the Government's behalf and was expressly carrying out the policy of keeping the sale of energy under the control of the United States. He was, at the same time, insuring that contract revenues would continue for retirement of the dam's cost.[50] We

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[46] *E.g.*, Respondents' contracts and Arizona's ran for less than 50 years. Nevada's, in effect, should also be included here because of Nevada's right to terminate at will.

[47] The original allocation plan contemplated that both Arizona and Nevada could terminate on short notice without further obligation and without prejudice to their rights to acquire another contract for energy. Art. V F (v), Regulations, in Appendix A, and see Art. 9 F (v) of Nevada contract. (B. 570).

[48] *E.g.*, District, City and Edison, among others, had rights to "secondary energy." City had rights to energy contracted for and "unused" by the municipalities for the purpose of serving their inhabitants, see Art. V F (ii), Regulations, in Appendix A, *to which City's renewal rights apply!* (Art. 26, City contract, B. 309).

[49] 149 F. Supp. 158, 162.

[50] The Court expressly noted that Cal-Pac's situation in this respect was precisely the same as the municipalities and states. Payment for the energy taken by the municipalites and states was guaranteed by City and Edison just as payment for the unused energy is guaranteed by the District. 149 F. Supp. 158, 161. We

believe that these findings compose a full answer to petitioners' contentions.

Actually, petitioners' difficulties really stem from their preoccupation with the fact that the Project Act contemplated a self-financing venture. Time and again, petitioners revert to the argument that Cal-Pac's contract is purportedly not covered by the Act's contract provisions because it did not contain a firm commitment for a 50 year term.[51] But in their zeal to exclude Cal-Pac from the Act's coverage, petitioners overlook the fact that they exclude virtually everyone else. We have no quarrel with the fact that the Act contemplated that revenues from sales of energy would be used to repay the Project's cost. But Congress did not legislate to build the Project for the purpose of financing it. This Act was clearly designed as well to develop distribution of energy to consumers in the region of the dam and to encourage the building of facilities to accomplish such distribution. We submit that the contract provisions of the Act were written with this specific objective in view. Surely, Cal-Pac has fulfilled this objective and it and its consumers are subject to both the burdens and benefits comprehended by the Act's contract scheme.

Finally, petitioners urge that even if Cal-Pac is entitled to invoke the statutory renewal provision, its right to do so is secondary to other contractors' "first opportunity to contract" contained in the Secretary's Regulations.[52] The Secretary's Regulations, as they were promulgated in 1930, stated that in sales of "unused" energy the Secretary would offer the energy to City, Edison and

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add that the revenues paid by Cal-Pac, the municipalities, and the states physically go to the United States and are used to repay the costs of the project.

[51] City Petition, 12, 13; Gov't Petition, 11-12.

[52] *Id.* at 14-17, City Petition, 15-19. See Regulations, "Of Firm Energy Allocated to but not Used by the District" in Appendix A, p. 4a.

California Electric before selling it to others. Before selling energy to Cal-Pac, in 1937, the Secretary expressly offered it to these contractors and the offer was expressly refused.[53] There is absolutely nothing in the Regulation to indicate that the "first opportunity to contract" would survive a refusal and thus become a second, third, and fourth opportunity. For this reason alone, the Court below was justified in rejecting petitioners' contention.

However, petitioners urge that the renewal provision of the statute specifically made Cal-Pac's right to renewal subject to a "second" opportunity of certain contractors to purchase the energy because the statute provided that contract holders shall be entitled to renewal upon "such terms and conditions as may be authorized or required under the then existing laws and regulations . . . ."[54] On its face, the statute categorically asserts a mandatory entitlement to renewal and simply states that existing laws and regulations shall govern the terms in the renewal contract. It thus requires no great effort to ascertain that the "terms and conditions" clause does not affect the right to renewal, but relates only to the contents of the renewed contract. To verify this fact, we have turned back to the origins of the renewal provision in the Federal Water Power Act where the "terms and conditions" clause appears in identical language and in an identical situation. Its use there leaves absolutely no doubt that it refers specifically to terms to be written into renewed contracts and does not qualify in any way the fact of the right to renewal.[55]

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[53] See n. 14 *supra*.

[54] Gov't Petition, 14.

[55] See 16 USC § 808 in Appendix C. In the Power Act, the clause was used to distinguish the contents of licenses renewed for one year (on their existing terms) from those of licenses renewed for longer duration (on terms and conditions authorized by law). And in no event could the "terms and conditions" clause affect the *right* to renewal, for there was simply no situation where renewal could not occur unless the licensee's property was acquired.

Ultimately, petitioners must really face the fact that Section 5(b) simply does not state what they would like it to state. It would have been a simple matter to allow the Secretary to renew at his discretion, or to allow him to select, by regulation, those contractors to whom renewal might be granted. But the statute does nothing of the sort. The right to renewal is stated in unequivocal terms; it is stated in mandatory language; and it is expressly made applicable to any contractor. After all is said and done, the simple fact remains that Congress expressly chose to grant a right of renewal to the holder of "*any contract*". Cal-Pac contracted for energy particularly pursuant to the Act. Certainly, the Court of Claims did not err in unanimously concluding that Cal-Pac was entitled to a renewal of its contract under the Act.

6. Other Issues Would Result in Judgment for Respondent

In the court below, Cal-Pac also contended that, entirely apart from Section 5(b) of the Project Act, it was entitled to a renewal by virtue of the incorporation into its contract of (1) the District contract[56] and (2) then existing regulations.[57] We do not believe that the Court of Claims

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[56] R. 641. Art. 20 of the District contract, thus incorporated, provided that "the holder of any contract for electrical energy, *including the District*, not in default *thereunder*, shall be entitled to a renewal thereof . . ." (R. 336) (Emphasis added). This clause is carefully cast in language that makes it applicable to *others* beside the District. Since the District contract also provided that the Secretary should sell energy unused by the District to others, it follows that these others to whom such energy is sold are the *other holders* of contracts for energy specified in the renewal clause.

[57] Art. XVII of the Regulations contained a renewal provision. (R. 1125) The Regulations were incorporated into Cal-Pac's contract by Art. 23 of the Cal-Pac contract. R. 648. Though the renewal provision did not appear in later Regulations, Art. 23 specifically provided that changes in Regulations would not impair the rights of the contractor.

determined these issues. And, in any event, they would require the same result of granting summary judgment for Cal-Pac.

CONCLUSION

There are no "special or important reasons" requiring this Court's attention to this case. The judgment of the Court of Claims involves no principles or issues of general interest, but is concerned solely with an application of a particular provision of the Boulder Canyon Project Act to a unique set of facts. Actually, the Court's holding does not even have significance for the future administration of the Project, for the facts of this case are such that the issue posed need never arise again. Even the damages claimed by Cal-Pac are relatively insignificant in light of the Government's ability to mitigate them. And, in any event, the petition has no merit if only for the reason that the Court of Claims was entirely correct in its unanimous holding. There is thus no basis upon which a writ of certiorari could properly issue.

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APPENDIX A

Secretary's Regulations of 1930 (As Amended)*

"V

The following allocation of energy is made: (The percentages stated being percentages of the total firm energy available) subject, however, to the conditions hereinafter stated:

Of Firm Energy

A. To the State of Nevada, for use in Nevada, not exceeding eighteen per centum (18%) of said total firm energy.

B. To the State of Arizona, for use in Arizona, not exceeding eighteen per centum (18%) of said total firm energy.

* * *

C. To the Metropolitan Water District of Southern California for pumping Colorado River water into and in its aqueduct for the use of such District within the following limits:

(1) Thirty-six per centum (36%) of said total firm energy, which shall be paid for whether taken or not; plus

(2) All secondary energy developed at the Boulder Dam power plant as provided in Article Fourteen (14) hereof; plus

(3) So much of the firm energy allocated to the States, the City and the Company as may not be in use by them . . ."

[Part C (1) originally read:

"(1) Not exceeding thirty-six per centum (36%) of said total firm energy; plus . . ."]

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* Appearing at B. 1113, with amendments as appearing in District contract, B. 352.

"D. To the municipalities of Anaheim, Beverly Hills, Burbank, Colton, Fullerton, Glendale, Newport Beach, Pasadena, Riverside, San Bernardino and Santa Ana (referred to here as 'the municipalities'), six per centum (6%) in all, to be allocated between them as they may agree; but if no agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

E. To the City of Los Angeles, Thirteen per centum (13%).

F. To Southern California Edison Company Ltd., the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company and the Los Angeles Gas and Electric Corporation, referred to herein as the companies, nine per centum (9%) in all, division whereof between the companies shall be made according to mutual agreement among them, if possible. If no such agreement is submitted to the Secretary on or before April 15, 1931, the Secretary shall determine the allocation of each.

It is further agreed that:

(i) So much of the energy allocated to the States (thirty-six per centum (36%) of the firm energy) and not in use by them, or failing their use, by the District for the above purposes, shall be taken and paid for one-half by the City and one-half by the Company.

In addition, all firm energy allocated to the City (thirteen per centum (13%)) shall be taken and paid for by the City.

(ii) All of the energy allocated to the municipalities may be contracted for in compliance with regulations of the Secretary, by any one or more of them, as they may agree, on or before April 15, 1931. So much of the energy allocated to the municipalities as is not so contracted for, or if contracted for, not used by them directly or under contract for municipal purposes and/or distribution to their inhabitants, shall be taken and paid for by the City.

(iii) So much of the energy allocated to the Southern Sierras Power Company, the San Diego Consolidated Gas and Electric Company, and the Los Angeles Gas and Electric Corporation as is not firmly contracted for by them, severally, in compliance with regulations of the Secretary on or before April 15, 1931, shall be taken and paid for by the Company.

* * *

(v) Each of the States of Arizona and Nevada may, from time to time within the period of the aforesaid lease, contract for energy for use within such State in any amount until the total allocated respectively to each is in use as provided above; and may terminate such contract, or contracts, without prejudice to the right to again contract for such energy. All such contracts shall be executed with the Secretary. A contract requiring one thousand (1000) horsepower (of maximum demand) or less may become effective or be terminated on six months written notice of requirement or termination given the Director by the State; provided, that the notice given shall be two years if in the twelve months preceding said notice of demand the total increment to such state has exceeded five thousand (5000) horsepower of maximum demand or if in the twelve months preceding said notice of termination the decrement to such state has exceeded five thousand (5000) horsepower of maximum demand. In all cases the Director shall immediately transmit such notice to each lessee. Whenever the amount in use is in excess of five thousand (5000) horsepower of maximum demand, the lessees respectively shall be compensated for property rendered idle by use of such excess in such amount as the Secretary shall determine to be equitable. Firm energy not contracted for by the States shall be available for use by the District as herein elsewhere provided, and if not in use by the States and/or the District, shall be taken and paid for equally by the two lessees. No right which may be available to a State under section five (5) (c) of the Boulder Canyon Project Act to

execute a firm contract for electrical energy for use within the State shall be impaired by any provision of this contract.

Of Secondary Energy

It is further agreed that the District shall have the right to purchase and use all secondary energy as provided in Article nine (9) and Article fourteen (14) hereof for the purposes stated in the first paragraph of sub-division (C) of this Article. The City and the Company shall each have the right to purchase and use one-half of all secondary energy not used by the District. Any such energy not used by one lessee shall be available, for the time being, to the other. If secondary energy is not taken by the District, and City, and/or the Company then and in such event, the United States reserves the right to take, use and dispose of such energy, from time to time, as it sees fit, giving credit therefor as provided in Article twelve (12) of Exhibit "A" hereof.

Of Firm Energy Allocated to but not Used by the District

It is further agreed that in the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then the Secretary shall dispose of such unused energy until required by the District for said purpose, crediting on the District's obligation the proceeds of such disposition as received; provided, however, that no disposition of such firm energy shall be made by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated; and provided further that in the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal

terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take."

[This section originally read:

"*Of Firm Energy Allocated to but Not Used by the District*

In the event the District shall fail for any reason to use all or any of the firm energy herein allotted to it for the only purpose for which said firm energy is allotted to it, that is, for pumping water into and in its aqueduct, then no disposition shall be made of such firm energy by the Secretary without first giving to a successor to the District which may undertake to build or maintain a Colorado River Aqueduct the opportunity to take said firm energy for the same purpose and under the same terms as those to which the District was obligated.

In the event no such successor takes said firm energy as provided above, then no disposition of such firm energy shall be made by the Secretary without first giving to each lessee the opportunity to contract on equal terms and conditions, to be prescribed by the Secretary, for one-half of such energy, together with such portion of the remainder as the other lessee shall not elect to take."]

APPENDIX B

Boulder Canyon Project Act

SECTION 4(b)

"Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act."

SECTION 5

"That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

"After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

"General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

"(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

"Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

"(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

"(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

"The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

"(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary,

from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

"The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy."

APPENDIX C

Federal Water Power Act

SECTION 14 (16 USC § 807) "Notice—Compensation—Values Excluded—Rights Restricted to Cost—Condemnation"

"Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. . . ."

SECTION 15 (16 USC § 808) "Expiration of Licenses—Renewal—Conditions—Compensation"

"That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws

and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof:

Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid."